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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 947

WILLIAM SAMS, MICHAEL GIORANO, FRANK PHILLIPS, THOMAS CIANCUTTI,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

PAGE

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit 1

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional, Statutory and Procedural Rules Provisions Involved 3

Statement of the Case 5

Reasons For Granting The Writ

I. The Petitioners, Sams, Ciancutti and Giorano Were Denied Due Process of Law Because the Government Did Not Prove a Wager on an Actual Sports Event or Contest 9

II. The Petitioners Sams and Ciancutti Were Subjected to Excessive Fines and Double Punishment Forbidden by the Eighth Amendment When for the Same Act They Were Fined Consecutively and Cumulatively for Violations of Sections 7203 and 7262 of Title 26 13

III. Petitioner Ciancutti Was Denied Due Process of Law by Reason of His Conviction for Conspiracy Under Section 371 of Title 18 15

IV. The Petitioners Were Denied Due Process of Law Because the Court of Appeals for the Third Circuit Did Not Pass Upon Their Legal Points Raised Properly on Their Appeal to the Third Circuit 16

V. Petitioner Phillips Was Denied Due Process in His Conviction of Wilful Evasion of the Wagering Tax Under Section 7201 When the Records Necessary to Prepare His Return Had Been Seized by the Federal Agents by Search Warrant and Withheld From the Taxpayer 16

Table of Contents.

PAGE

Conclusion 18

Certificate of Service Upon Solicitor General 18

TABLE OF CITATIONS

CASES

Deutch v. U.S., 367 U.S. 472, 81 S.Ct. 1587 12

Holland v. United States, 348 U.S. 121 17

STATUTES

28 U.S.C. 1254 (1) and Rule 22(2) 2

General Conspiracy Statute, 18 U.S.C. 371 .. ...3, 5, 15

Attempt to Evade or Defeat Tax, 26 U.S.C. 7201 .....3, 4, 6, 16

Violation of Occupational Tax Law Relating to Wagering — Failure to Pay Special Tax, 26 U.S.C. 7262 .....2, 4, 5, 6, 9, 10, 11, 13, 14

Wilful Failure to Pay Tax, 26 U.S.C. 7203 .....2, 4, 5, 6, 9, 11, 13, 14

Title 26, Section 4411 — Imposition of Tax 9, 10

Title 26, Section 4421 — Imposition of Tax 9

Appendix "A"

Opinion of the Court, Filed January 13, 1965, by Smith, Circuit Judge 19

IN THE

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WILLIAM SAMS, MICHAEL GIORANO, FRANK PHILLIPS, THOMAS CIANCUTTI,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit affirming the judgments of the United States District Court for the Western District of Pennsylvania which had sentenced petitioners for violations of Income Tax and Wagering Tax Laws of the United States, and for a conspiracy to defraud the United States on charges which involved the Internal Revenue Laws.

OPINIONS BELOW

The Opinion of the Court of Appeals has not yet been reported. One copy of it constitutes Appendix "A" to this Petition for a Writ of Certiorari.

JURISDICTION

The judgments of the Court of Appeals for the Third Circuit were entered on January 13, 1965, and Petitions for Rehearing were duly filed which Petitions were denied by the Court of Appeals on February 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22(2).

QUESTIONS PRESENTED

1. In indictment counts charging violations of the Wagering Tax Statutes, 26 U.S.C. 7203 and 23 U.S.C. 7262, should not convictions be set aside because petitioners were denied due process of law when the Government did not prove a wager on an actual or occurring sports event or contest?

2. When defendants are sentenced consecutively and cumulatively for violations of Sections 7262 and 7203 of Title 26 for offense occurring on same day, is this not double punishment and excessive fines forbidden by the Eighth Amendment when under the doctrine of merger, any act done under 7262 was a necessary ingredient of 7203, it being impossible to violate 7203 without first violating 7262?

3. Was petitioner Ciancutti denied due process of law in his conviction of conspiracy under Section 371 of Title 18?

4. Were the petitioners denied due process of law because the Court of Appeals for the Third Circuit did not pass upon two important legal points raised properly on their appeal to the Third Circuit?

5. Was petitioner Phillips denied due process in his conviction of wilful evasion of the Wagering Tax under Section 7201 of Title 26 when his records which contained betting data in the exact amount making up the alleged tax deficiency set forth in the indictment had been seized by Federal Agents by search warrant and withheld from the taxpayer and taxpayer had no knowledge of contents?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

1. General Conspiracy Statute, 18 U.S.C. 371:

> "If two or more persons conspire * * * to defraud the United States * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

2. Attempt to Evade or Defeat Tax, 26 U.S.C. 7201:

> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this Title or the payment thereof, shall, in addition to other

penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than five years, or both, together with the costs of prosecution."

3. Violation of Occupational Tax Law Relating to Wagering—Failure to Pay Special Tax, 26 U.S.C. 7262:

"Any person who does any act which makes him liable for such tax under Subchapter B of Chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000.00 and not more than $5,000.00.

4. Wilful Failure to Pay Tax, 26 U.S.C. 7203:

"Any person required under this Title to pay any estimated tax or tax, * * * who wilfully fails to pay such * * * tax, * * *, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $10,000.00 or imprisoned not more than one year, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

This criminal case arises out of a fifty count indictment found in the Western District of Pennsylvania. The indictment charges a conspiracy under Section 371 of Title 18 and the substantive counts charge violations of the Wagering Tax Laws, and a wilful evasion of the Wagering Tax Laws.

The petitioners were all convicted after jury trial before Judge Edward Dumbauld in the United States District Court for the Western District of Pennsylvania. The Court of Appeals for the Third Circuit affirmed the convictions with one exception. Said Court of Appeals vacated the conviction of petitioner Sams on the second count of the indictment (wilful evasion). The said Court of Appeals denied petitioners' Petition for Rehearing. The petitioners' judgments of conviction are as follows:

Sams:

First Count: 18 U.S.C. 371
Imprisonment for two years, fine—$10,000.00.

Fifth Count: 26 U.S.C. 7203
Fine — $10,000.00

Sixth Count: 26 U.S.C. 7262
Fine — $5,000.00

Seventh Count: 26 U.S.C. 7203
Fine — $10,000.00

Eighth Count: 26 U.S.C. 7262
Fine — $5,000.00

Phillips:

First Count. - .S.C. 371
Imprisonment for two years, fine — $10,000.00

Second Count: 26 U.S.C. 7201
Fine — $10,000.00
Third Count: 26 U.S.C. 7206(1)
Fine — $5,000.00
Fourth Count: 26 U.S.C. 7206(1)
Fine — $5,000.00

Ciancutti:

First Count: 18 U.S.C. 371
Imprisonment for two years, fine — $10,000.00
Fifteenth Count: 26 U.S.C. 7203
Fine — $10,000.00
Sixteenth Count: 26 U.S.C. 7262
Fine — $2,500.00
Seventeenth Count: 26 U.S.C. 7203
Sentence suspended
Eighteenth Count: 26 U.S.C. 7262
Fine — $2,500.00

Giorano:

Forty-Second Count: 26 U.S.C. 7262
Fine — $5,000.00

The sentences as to petitioners Sams, Phillips and Ciancutti on the first count convictions was imprisonment for two years and a fine of $10,000.00. This sentence was conditional that if all other fines and costs were paid, the sentence of imprisonment on the first count would be suspended. The sentence on conspiracy count was declared void by the Court of Appeals.

A gambling operation on the second floor of the Garibaldi Building in New Kensington, Pennsylvania, was being conducted (R. 70a, 197a, 288a). Premises were

separated into two parts described in the evidence as the northern part and the southern part. Dice and other gambling activities not taxable by the Wagering Tax Laws were operated on the northern portion of the room. The southern part was operated as a horse room (R. 75a, 184a). Petitioner Ciancutti leased the whole room and then sublet the southern half thereto to petitioner Phillips (R. 353a, 360a). Ciancutti testified that he ran the dice game but that he had no connection with the horse room (R. 352a, 361a-362a). There were usually seventy to eighty persons, including employees, in the horse room at one time (R. 271a). The establishment was raided by the Federal Internal Revenue Agents, armed with search warrant, on August 24, 1961. The agents seized betting slips which showed the volume of two days' business—August 23 and August 24, 1961, in the amount of $7,973.00. The agents seized all the cash on the premises. They found $98.60 in the horse room and $495.10 on the person of petitioner Phillips. The Government contended that the slips showing the sum of $7,973.00 were the result of telephone transactions and not a cash basis (R. 253a-254a, 314a, 315a, 402a). Entrance to the establishment was guarded by a steel door and the windows were closed and darkened with plywood (R. 55a, 372a). The room had been under surveillance by Government Agents from April, 1961 until the date of the raid on August 24, 1961 (R. 116a).

Petitioner Phillips was in the place daily and his wagering tax stamp was posted on the premises (R. 84a, 360a); petitioner Phillips claimed that he was the operator of the horse room and owned the equipment therein (R. 120a, 141a).

Sams was not on the premises regularly (R. 153a); and he was not on the premises on the day of the raid. His activities were confined in the horse room enclosure where he handled the money on pay-offs and accepted bets (R. 99a). He, on one occasion, scolded the doorman for not doing his job (94a, 187a).

Giorano was a resident of Miami, Florida, and was indicted and convicted under the forty-second count which charged that on or about the 18th day of August, 1961, he received a wager for another without having paid the special ($50.00) tax. Neither Sams, Giorano or Ciancutti had a wager tax stamp. The records of the horse room were gathered, bundled and removed from the premises at the end of each day's business (R. 107a).

As to the substantive counts involving the Wagering Tax Laws, there was no proof on the part of the Government that taxable wagers as charged in the indictment on specific days were placed on an actual sports event or contest. The Government did not show as to the substantive counts that a race or sporting event or contest was ever run or that such sporting event or contest ever actually occurred.

REASONS FOR GRANTING THE WRIT

I. The Petitioners, Sams, Ciancutti and Giorano Were Denied Due Process of Law Because the Government Did Not Prove a Wager on an Actual Sports Event or Contest.

It is fundamental that in a criminal case the Government must prove each element of the crime charged. In this case the indictment charged that the petitioners Sams, Ciancutti and Giorano violated the law of the United States, 26 U.S.C. 7262, by the doing of an act[1] which required the petitioners to have a $50.00 special stamp required by the Act of Congress and with the wilful failure under 26 U.S.C. 7203 to pay said $50.00 special tax. A necessary and essential ingredient of the violation of either of these two Acts of Congress is that the petitioners must be proven beyond a reasonable doubt to have received a wager as defined in the Wagering Tax Act, 26 U.S.C. 4421. Congress had defined wager as follows:

> "(1) Wager:—the term "wager" means—
>
> (a) any wager with respect to a sports event or a contest placed * * *"

Petitioner Sams is charged in the fifth count with violating 26 U.S.C. 7203 with wilful failure to pay the special wager tax for the fiscal year ending June 30, 1961. This was the $50.00 special tax imposed by Section 4411 of Title 26 U.S. Code.

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1. Section 4411 of Title 26—Imposition of tax imposes a $50 tax per year to be paid by each person who is engaged in receiving wagers for or on behalf of any person liable to pay the 10% excise tax on wagers.

The sixth count charged Sams with the violation of 26 U.S.C.A. 7262 which was doing of an act, the accepting of a wager during the fiscal period of 1961 ending June 30th, particularly the months of April and May, which made him liable for the payment of the special tax imposed (Sec. 4411).

The seventh count charges Sams with a violation in the latter fiscal half of 1961, specifically that on the 9th day of August, 1961, Sams accepted a wager without having paid the special tax imposed by Section 4411 and that the said Sams wilfully failed to pay said tax.

The eighth count charges Sams on the same day, August 9, 1961, with the accepting of a wager without having paid the special tax imposed by Section 4411 in violation of Section 7262 of Title 26.

It was the Government's contention and the case was tried upon the theory that petitioner Sams accepted wagers on horse races at specific times. Nowhere in the record was there any proof by the Government that an actual horse race took place or that a bet was accepted by Sams on a race which actually took place. As to the specific date of August 9, 1961, violations charged in Counts Seventh and Eighth, there is no proof of the actual running of a horse race on that date. The only proof as to August 9, 1961, in the record is that found in the testimony at R. 87a which is as follows:

"Q. Well, we will get to your observations in a minute. I am concerned with your personal dealing with these defendants.

A. On August 9, I placed a bet with William Sams and Frank Phillips.

Q. Was that two separate bets?
A. Two individual bets. I placed one bet with William Sams at 4:45 P.M. * * *"

There was no proof of an actual race in April or May, 1961. Petitioner Sams submits therefore that he was denied due process of law on his convictions on the fifth, sixth, seventh and eighth counts because the Government did not prove an essential element of the crime charged.

Petitioner Ciancutti was charged in counts fifteenth, sixteenth, seventeenth and eighteenth with violations of Sections 7203 and 7262 of Title 26. The fifteenth and sixteenth counts applied to a period in the first fiscal half of 1961 during the months of April and May. The seventeenth and eighteenth counts applied to the second fiscal half of 1961, the months of July and August, and charged violations of Sections 7203 and 7262 of Title 26.

Giorano was charged and convicted on the forty-second count of the indictment with having received a wager on behalf of another person without having the $50.00 special tax stamp required by Section 4411, in violation of Section 7262 of Title 26.

The establishment was in New Kensington, Pennsylvania, and under the evidence, petitioner Giorano was a visitor in New Kensington during part of the month of August, 1961. This petitioner is charged with a specific count of receiving a wager on the 18th day of August, 1961. The testimony in the record with respect thereto is at Page 87a-88a where one of the Internal Revenue Agents testified "On August 18 at 5:00 P.M. I placed a bet with Michael Giorano."

There is no other testimony relating to Giorano and any betting in the record. Petitioner Giorano submits that he was denied due process of law by a conviction on this testimony without any proof that a sporting event or contest had occurred or took place on or about August 18, 1961, or that he accepted a wager on any sports event or contest. It was the theory of the Government that the wager involving Giorano was one placed on a horse race. The Government did not prove as to the substantive count that a horse race took place.

The petitioner was therefore denied his constitutional right of having a crime with all its elements proven against him. It was incumbent upon the Government to prove that the petitioner had committed the offense for which he was indicted. One element of that offense was the receiving of a wager, as defined by the Act of Congress. *Deutch v. U.S.*, 367 U.S. 472, 81 S.Ct. 1587.

II. The Petitioners Sams and Ciancutti Were Subjected to Excessive Fines and Double Punishment Forbidden by the Eighth Amendment When for the Same Act They Were Fined Consecutively and Cumulatively for Violations of Sections 7203 and 7262 of Title 26.

Petitioner Sams was fined the sum of $10,000.00 for the offense charged in the fifth count—7203—wilful failure to pay the special tax. He was fined the sum of $5,000.00 for a violation of the sixth count—7262—the doing of the act requiring a stamp. Both the fifth and sixth counts involve the same period of time, to-wit, April and May, 1961.

Petitioner Sams was convicted under the seventh count of a violation of Section 7203 and fined $10,000.00. He was convicted under the eighth count which charged a violation of 7262, and he received a fine of $5,000.00. The seventh and eighth counts charged the same day, to-wit, the 9th day of August, 1961. The fines against Sams are consecutive and cumulative.

The fifth count carried a $10,000.00 fine for the wilful failure to pay the $50.00 special tax, and the sixth count carried a $5,000.00 fine for the doing of an act which required the payment of the special $50.00 tax. The identical situation applied to the seventh and eighth counts for the 9th day of August, 1961.

Petitioner Sams submits that the doctrine of criminal merger applied to these counts, and that any violation of Section 7262 of Title 26 merged with the crime defined in Section 7203 of said Title because of the crime defined in 7203 is the greater offense and that violation

of 7262 is necessarily included in a conviction under 7203. It is impossible to commit the crime alleged under the fifth and seventh counts without having first committed the taxable act charged in he sixth and eighth counts which was the doing of an act by the petitioner which required him to pay the special tax.

This point was raised specifically in the Court of Appeals and again by Petition for Rehearing. The Circuit Court would not pass on petitioner's point.

Petitioner Ciancutti is in the same position as to the fifteenth and sixteenth counts. In the fifteenth count, he is charged with the violation during the months of April and May, 1961, with the wilful failure to pay the special tax, and in the sixteenth count, he is charged for the same period with failure to pay the tax. His fines were also cumulative. He was fined $10,000.00 for the violation of Section 7203 and $5,000.00 for a violation of Section 7262.

Petitioners urge that their rights under the Eighth Amendment were violated by the excessive fines and that they were doubly punished because by the doctrine of merger any violation of Section 7262 is, by necessity, included in and a part of Section 7203.

III. Petitioner Ciancutti Was Denied Due Process of Law by Reason of His Conviction for Conspiracy Under Section 371 of Title 18.

Petitioner Ciancutti was charged with conspiring to defraud the United States by obstructing the lawful governmental functions of the Internal Revenue Service in collecting the wagering taxes. There is no evidence in the record that petitioner Ciancutti accepted any wagers nor was he engaged in any business appertaining to any taxable wagers. It was undenied that Ciancutti was the operator of the dice and barboot portion of the premises unconnected with any horse room section. He took no part in any activities for which a special stamp was required by the Federal Government. There is nothing in the record to show any proprietary interest on the part of petitioner Ciancutti as to any business where a wagering tax is involved.

He was a gambler openly engaged in operating a dice game for which no Federal stamp is necessary. He was therefore under this record convicted when there was no evidence sufficient to connect him with the operations, and he was accordingly denied due process.

IV. The Petitioners Were Denied Due Process of Law Because the Court of Appeals for the Third Circuit Did Not Pass Upon Their Legal Points Raised Properly on Their Appeal to the Third Circuit.

The petitioners raised in the Court of Appeals the questions of the failure of the Government to prove an essential element of the substantive crimes in violation of the Wagering Tax Laws, and refused to pass upon the double punishment points or to pass upon the doctrine of merger in criminal case.

Therefore your petitioners ask that your Honorable Court supervise the administering of criminal justice by the federal judiciary by granting the Writ of Certiorari and passing upon petitioners' legal points as above set forth which were ignored by the Court of Appeals.

V. Petitioner Phillips Was Denied Due Process in His Conviction of Wilful Evasion of the Wagering Tax Under Section 7201 When the Records Necessary to Prepare His Return Had Been Seized by the Federal Agents by Search Warrant and Withheld From the Taxpayer.

Count Two of the Indictment charged Phillips with filing on October 11, 1961, a form 730—tax on wagering, wherein it was stated that the gross amount of wagers accepted in the month of August, 1961 was $3,200.00, and the tax was 10% thereof when he well knew that the gross amount of the wagers accepted during the month of August, 1961, was $7,900.00 in violation of the Wilful Evasion Statute, 26 U.S.C. 7201.

Petitioner Phillips alleges that he was denied due process of law on his conviction on this count wherein

he was fined the sum of $10,000.00 for the following reasons: When the establishment was raided on August 24, 1961, the Government Agents, pursuant to their search warrant, seized all the records in the place; they then reconstructed these records which showed bets received and recorded at the room on the 23rd and 24th of August, 1961, in the amount of $7,973.00.

Count Two of the indictment is a wilful evasion count directed against the petitioner Phillips because of his failure to include in his return for the month of August, 1961, the amount of bets shown by the seized betting slips. There is nothing in the record which would show any knowledge on his part as to the amount shown by the seized records as these records were apparently telephone bets with no proof that Phillips knew of their existence.

Therefore it is alleged that on Count Two, petitioner Phillips was denied due process of law in being convicted on a felony count for wilful evasion when the books and records necessary for him to make a return for the month of August, 1961, were in the hands of the raiding authority, the Internal Revenue Agents, by virtue of a search warrant, and were unavailable to and withheld from Phillips at the time he made his return. There were no badges of fraud present as to the count and the theory of the Government was that Phillips had attempted to willfully evade the monthly tax by his failure to include in the return the amount of business contained in the seized records. All the Government proved was that Phillips had understated the receipts for the month involved. This is not sufficient under *Holland v. United States,* 348 U.S. 121.

CONCLUSION

For the reasons set forth herein, we respectfully submit that this Petition for Writ of Certiorari should be granted.

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that I have served five copies of the foregoing Petition upon the Solicitor General of the United States, Department of Justice, Washington 5, D.C., by placing them in the United States mail addressed to him.

VINCENT M. CASEY
An Attorney for Petitioners

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 14576
UNITED STATES OF AMERICA
v.
WILLIAM SAMS, Appellant
No. 14577
UNITED STATES OF AMERICA
v.
MICHAEL GIORANO, a/k/a NICK JEROME,
Appellant
No. 14578
UNITED STATES OF AMERICA
v.
FRANK PHILLIPS, Appellant
No. 14579
UNITED STATES OF AMERICA
v.
THOMAS CIANCUTTI, Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued March 10, 1964

Before BIGGS, *Chief Judge*, and HASTIE and SMITH, *Circuit Judges*

OPINION OF THE COURT

(Filed January 13, 1965)

SMITH, *Circuit Judge*.

The appellants Ciancutti, Sams and Phillips were tried and found guilty on each of several counts of an

indictment charging violations of the Gambling Tax Act of 1954 as amended and the relevant sections of the Internal Revenue Code. Ciancutti and Sams were convicted of the *failure,* in each of two separate periods covered by different counts of the indictment, to pay the occupational tax imposed by §4411 of Title 26 U.S.C., in violation of §7262 of the same title, and the *willful failure,* in each of the same periods, to pay the same occupational taxes in violation of § 7203 of the same title. Sams and Phillips were convicted of the willful attempt to defeat and evade a large part of the excise tax imposed by § 4401 of Title 26 U.S.C., in violation of § 7201 of the same title. Phillips was convicted also of knowingly making and filing, on March 2, 1961, and June 30, 1961, an application and return which he did not believe to be true and correct, in violation of § 7206(1) of Title 26 U.S.C. All three were convicted of conspiracy to defraud the United States by impeding and obstructing the ascertainment, computation, assessment and collection of the taxes imposed by the cited sections, in violation of § 371 of Title 18 U.S.C. The appellant Giorano was convicted on only one count charging the willful failure to pay the occupational tax. The present appeals are from the judgments entered on the verdicts.

The judgments are challenged as erroneous mainly on the ground that the evidence as to each appellant was insufficient to sustain his conviction on the respective counts of the indictment. In our consideration of the questions raised by this challenge we are required to review the evidence, together with all inferences reasonably and logically deducible therefrom, in the light most favorable to the government. *United States v. Minker,* 312 F. 2d 632, 635 (3rd Cir. 1962), cert. den. 372 U. S.

953; *United States v. Malfi,* 264 F. 2d 147, 148 (3rd Cir. 1959), cert. den. 361 U.S. 817; *United States v. Giuliano,* 263 F. 2d 582, 584 (3rd Cir. 1959). We consider first the evidence as it relates to Ciancutti, Sams and Phillips.

During the period here in question, between the latter part of June 1960 and August 24, 1961, a gambling casino was in full operation in the Garibaldi Building, located at 1195 Fifth Avenue, New Kensington, Pennsylvania. The enterprise occupied the entire second floor of the premises, which was furnished and equipped as both a horse and gaming room. These facts are not disputed.

Ciancutti argues that the evidence as to him was insufficient to establish that his connection with the wagering operations was such as to make him liable under the statute for either the occupational or excise taxes. Phillips concedes his participation in the operation of the horse room but argues that the evidence was insufficient to establish that he either filed false applications and returns or willfully attempted to defeat and evade the excise taxes. Sams argues that the evidence was insufficient to sustain his conviction under § 7262, supra, failure to pay the occupational tax, or § 7203, supra, willful failure to pay the same tax. All three argue that the evidence was insufficient to support the charge of conspiracy. We consider the evidence as it relates to each of the appellants and with particular reference to the arguments advanced on their respective behalfs.

The entire second floor of the Garibaldi Building was admittedly under lease to Ciancutti, who entered into possession early in June of 1960.The leased area was a large open room which had been formerly used at

various times as a warehouse or dance hall. When Ciancutti took possession he engaged the services of a carpenter who made such alterations as were necessary to convert the premises into a gambling casino and to conceal its operations. These alterations were extensive and included, among other things, the following: the insertion of fiber-board panels in the window frames; the fitting of the entrance staircase with an electrically controlled door at the lower level and a steel door at the upper level; and, the erection of partitions enclosing two office areas. The doors were so arranged that a prospective customer could gain admission to the gambling casino only after he had been identified and admitted by a door man stationed inside. Ciancutti also made the arrangements for the installation of utilities, for which he paid the monthly service charges. During the period that the gambling casino was in operation Ciancutti was in attendance almost daily.

Between a date early in April and August 24, 1961, the Garibaldi Building was under surveillance by special agents of the Internal Revenue Service, one of whom first gained access to the gambling casino on April 23. Thereafter he visited the casino two or three times a week, and on each visit remained on the premises during the usual business hours, placing wagers and observing the operations. At various times the said agent was accompanied by either one or two other special agents, who likewise placed wagers and observed the operations. The results of their observations are fully described in their testimony and can be briefly summarized.

The wagering operations were conducted daily during the afternoon hours and there were usually in

attendance £0 or more customers. There were made available for use by these customers printed betting slips, daily racing forms and other materials usually found in a horse room. After the races had been run the results were posted on a large blackboard which extended along the south side of the main room.

The center of the wagering operations was an office, designated in the testimony as the "southern enclosure" in which a special tax stamp issued to Phillips and another issued to one Mangini were conspicuously displayed. The main area of the casino was manned by eleven or twelve employees, designated as "floor men," who received the wagers on behalf of their principals and then turned them in at the office.

Sams was in attendance at the casino almost daily during the afternoon hours and when there assumed charge of the office. He received wagers turned in by the floor men, checked betting slips, handled the tally sheets and supervised the distribution of winnings. When Sams was not present these duties were performed by either Phillips or one Carlucci. The wagers received by the floor men were delivered by them at the office to Sams, Phillips or Carlucci. On occasions both Sams and Phillips would physically receive wagers directly from the bettors; in fact, on numerous occasions the special agents placed their wagers with either Sams or Phillips.

Ciancutti concedes that he did not pay the special tax imposed by § 4411, supra, but maintains that he was under no obligation to do so. He took the witness stand and admitted that he had leased the entire second floor of the Garibaldi Building and had converted it into a gambling casino. However, he testified that he had sub-

let the area in which the wagering operations were conducted and that his sole proprietary interest was in the gaming activities. Absent this testimony, to which the jury apparently gave no credence, there was ample evidence from which the jury could have found that Ciancutti was one of three entrepreneurs in a profitable gambling business, which included the horse room operations.

This appellant also contends, but in the alternative, that the evidence was insufficient to sustain his convictions under either § 7203 or § 7262, supra. A similar contention is advanced on behalf of Sams. They argue that there is no evidence in the record that they had knowledge of their obligation to pay the occupational tax imposed by § 4411, supra, and therefore should not have been found guilty of either a *failure* or *willful failure* to pay it. This argument is without merit. *Ingram v. United States,* 360 U. S. 672 (1959); *United States v. Minker,* supra; *United States v. Marquez,* 332 F. 2d 162 (2nd Cir. 1964); *United States v. Shaffer,* 291 F. 2d 689 (7th Cir. 1961), cert. den. 368 U. S. 915. While there is no direct evidence that they knew of the occupational taxes there was ample circumstantial evidence from which the jury could have inferred that they had knowledge of the taxes and willfully failed to pay them. Ibid.

Phillips challenges the sufficiency of the evidence to sustain his convictions under § 7206(1), supra, which makes it an offense for any person to willfully make and subscribe a return or statement "which he does not believe to be true and correct as to every material matter." The challenge rests on utterly trivial grounds

which merit no discussion. The evidence was more than sufficient to support the convictions.

On March 2, 1961, this appellant made and subscribed an application and return in which he purportedly furnished the material information required under § 4412 of Title 26 U.S.C. He filed a similar application and return on June 30, 1961. The appellant stated in each of these documents, in response to pertinent questions therein contained, that: his place of business was at 1809 Fourth Avenue, Arnold, Pennsylvania; he was in the business of accepting wagers on his own account; he did not receive wagers for or on behalf of any other persons; and, he had no employees or agents engaged in receiving wagers on his behalf.

The patent falsity of Phillip's statements was established by clear and persuasive proof that: the appellant and two others had a proprietary interest in the wagering operations conducted at 1195 Fifth Avenue, New Kensington; this was their only place of business; they were engaged in accepting wagers on behalf of their joint enterprise; and, they employed at least twelve floor men who were engaged in receiving wagers on their behalf. There was substantial evidence, direct and circumstantial, from which the jury could have found that Phillips acted as a front and made the false statements with the willful intent to conceal the magnitude of the wagering enterprise, its location and the proprietary interest of Ciancutti and Sams. *United States v. Shaffer*, supra.

Phillips and Sams contend that the evidence was insufficient to support their convictions under § 7201, supra, which makes it a felony for any person to attempt

"in any manner to evade or defeat any tax imposed by" the Internal Revenue code. The crucial question raised by this contention is whether the evidence was sufficient to establish that the filing of an incorrect return for the month of August 1961, was prompted by a "willful attempt" to evade and defeat the taxes for the said month. It is necessary to consider the evidence as to Phillips separate and apart from the evidence as to Sams.

Phillips held a special tax stamp and posed as the sole owner of the wagering operations. As required by the pertinent regulations, he filed separate returns for the months of April, May, June and July of 1961, and for the respective months reported and paid excise taxes in the amounts of $391, $371, $397 and $390. These payments reflected gross wagers for the respective months in the amounts of $3910, $3710, $3970 and $3900. On each of the said returns his place of business was recorded as 1809 Fourth Avenue, Arnold, his place of residence. It is inconceivable that a large-scale wagering enterprise, employing twelve floor men in addition to three owners, could have been maintained for a period of more than a year on a gross return of less than $4000 per month.

There is ample evidence that Phillips prepared, subscribed and filed the tax return for the month of August. This return was substantially in accord with those filed for the earlier months. Phillips reported gross wagers in the amount of $3200 and a payable tax of $320. An audit of the betting slips found in the casino on the date of the raid, August 24, disclosed gross wagers received for the said month in the amount of $7973, and of this amount $5984 was received on the day of the raid and

approximately $1600 on the prior day. The gross amount of wagers received exceeded that reported by more than $4700, and the taxes due thereon exceeded those reported by more than $475. The majority of the betting slips found on the premises reflected only the wagers received on August 23 and 24; there were found only eight slips reflecting wagers received on the preceding days. The "daily record showing the gross amount of all wagers," required by § 4403 of Title 26 U.S.C., was not found and Phillips offered no explanation for its absence.

We recognize that the mere proof that a taxpayer has understated his gross income will not support a charge made under § 7201, supra, in the absence of further independent proof that the understatement was accompanied by a specific intent to evade or defeat the taxes lawfully due. *Holland v. United States,* 348 U. S. 121, 139 (1954); *United States v. Holovachka,* 314 F. 2d 345, 357 (7th Cir. 1963), cert. den. 374 U. S. 809; *Black v. United States,* 309 F. 2d 331, 337 (8th Cir. 1962), cert. den. 372 U. S. 934; *Blackwell v. United States,* 244 F. 2d 423, 429 (8th Cir. 1957), cert. den. 355 U. S. 838. Such intent may be inferred from conduct the likely effect of which would be to mislead or conceal. Ibid. There is ample evidence in the record that Phillips was guilty of such conduct. This evidence, submitted to the jury without refutation, was more than sufficient to prove Phillips guilty of "willfully" attempting to evade and defeat his tax liability. Ibid.

The evidence relating to Sams' participation in the wagering enterprise was summarized hereinabove. We are of the opinion that this evidence, considered in its entirety and in the light most favorable to the govern-

ment, although sufficient to support his convictions under §§ 7203 and 7262, was insufficient to sustain his convictions under § 7201. The conviction of Sams on count 2 of the indictment must therefore be reversed.

The appellants contend that the evidence was insufficient to support their convictions on the charge of conspiracy. The decision of the Supreme Court in the case of *Ingram v. United States,* supra, is dispositive of the question raised and the contention must therefore be rejected as without merit.

Giorano was convicted on only one count charging a willful failure to pay the occupational tax. He challenges the sufficiency of the evidence to sustain the conviction and advances in support thereof the same arguments advanced by Sams and Ciancutti. The arguments are without merit. There is ample evidence from which the jury could have found, as it did, that: Giorano was engaged in receiving wagers on behalf of the owners of the enterprise; he was fully aware of his statutory obligation to pay the occupational tax; and, he willfully failed to pay it.

The court below imposed separate fines on the appellants Ciancutti, Sams and Phillips and on each count of the indictment on which they were convicted; on the first count charging them with conspiracy each of the appellants was sentenced to a term of imprisonment of two years. The judgment entered as to each appellant provided that the term of imprisonment would "be suspended upon payment of all the fines" but failed to provide for probation. This suspension of the term of imprisonment was void for two reasons: it was conditional, and, in effect, indefinite.

Appendix "A".

The authority of a district court to suspend either the imposition of execution of sentence is derived from § 3651 of Title 18 U.S.C., which provides in pertinent part as follows: ". . . any court having jurisdiction . . . , may suspend the imposition or execution of sentence *and place the defendant on probation* for such period and upon such terms and conditions as the court deems best." (Emphasis supplied). The same section provides that the period of probation "shall not exceed 5 years." Where an offense of which a defendant has been convicted is punishable by fine, imprisonment or both, there are available to the court several alternatives, only one of which is pertinent here.

Where the district court has, in addition to the imposition of permissible fines, sentenced the defendant to a term of imprisonment, it may suspend the execution of the term of imprisonment, place the defendant on probation for a specified period, and prescribe the terms and conditions of that probation. The court may not, as it did here, suspend the execution of a term of imprisonment without placing the defendant on probation of a specified period. *Miller v. Aderhold,* 288 U.S. 206 (1933); *Ex Parte United States,* 242 U. S. 27 (1916); *United States v. Graham,* 325 F. 2d 922 (6th Cir. 1963). A judgment which purportedly suspends the execution of a term of imprisonment indefinitely lacks finality and is therefore a nullity. Ibid. The judgment in this case is subject to a further objection. The suspension of the execution of a term of imprisonment which is made conditional upon payment of the fines imposed is not authorized by the statute. *Horton v. United States,* 151 F. 2d 406 (5th Cir. 1945). Those portions of the judgments

relating to the suspension of sentence must be vacated and corrected.

The judgments of conviction, except that relating to Sams on the second count of the indictment, will be affirmed. The conviction of Sams on the second count will be vacated. The action will be remanded to the court below with directions to correct the sentences.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.